

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes and other authorities involved.....	2
Statement.....	2
Argument.....	5
Conclusion.....	8
Appendix.....	9

CITATIONS

Cases:

<i>Alexandria Gravel Co. v. Commissioner</i> , 95 F. 2d 615.....	7
<i>Baskin v. State ex rel.</i> , 107 Okla. 272.....	7
<i>Burnet v. Houston</i> , 283 U. S. 223.....	5
<i>Heininger v. Commissioner</i> , 133 F. 2d 567, certiorari granted, June 14, 1943.....	7
<i>Helvering v. Kehoe</i> , 309 U. S. 277.....	6
<i>Helvering v. Rankin</i> , 295 U. S. 123.....	6
<i>Rugel v. Commissioner</i> , 127 F. 2d 393.....	7
<i>Textile Mills Corp. v. Commissioner</i> , 314 U. S. 326.....	6
<i>Wilmington Trust Co. v. Commissioner</i> , 316 U. S. 164.....	6

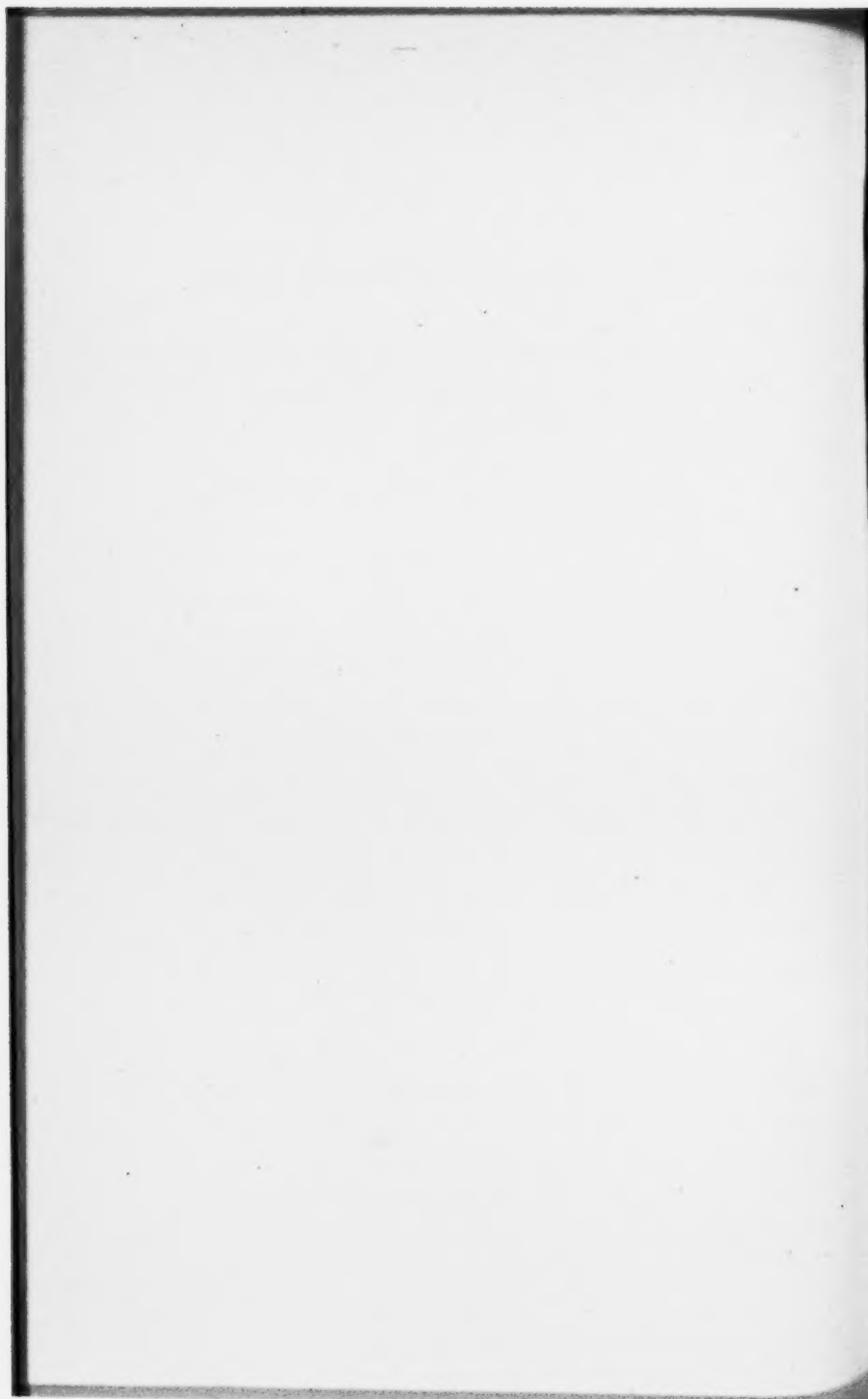
Statute:

Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 23.....	9
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Miscellaneous:

Constitution of the State of Oklahoma, Art. V:	
Sec. 9.....	10
Sec. 10.....	10
Sec. 23.....	6. 8. 10
Sec. 26.....	11
Sec. 27.....	11
Treasury Regulations 101, Art. 23 (q)-1.....	9

(1)



In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 433

HARDEN MORTGAGE LOAN COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 11-20) is not officially reported. The opinion of the Circuit Court of Appeals (R. 50-54) is reported at 137 F. 2d 282.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 20, 1943 (R. 54-55). Petition for a writ of certiorari was filed October 20, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer, which was engaged in the mining and selling of rock asphalt for road building, may deduct as ordinary and necessary business expenses under Section 23 (a) of the Revenue Act of 1938 certain amounts which it paid in 1938 in connection with the sale of rock asphalt to the State Highway Commission of Oklahoma and to contractors for use in building State highways in Oklahoma, pursuant to the specifications of the Oklahoma State Highway Commission.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved will be found in the Appendix, *infra*, pp. 9-11.

STATEMENT

Taxpayer is a corporation with its principal office in Oklahoma City, Oklahoma (R. 12). It keeps its books on the accrual basis (R. 25). Through its Southern Division it operates strip mines at Dougherty, Oklahoma, from which it produces and sells lime-rock asphalt and sandstone to blend into rock asphalt. Rock asphalt is used as a road-building material, and is sold principally to cities, counties, and states. (R. 12.)

In 1933 or 1934 the general manager of petitioner's Southern Division (then a subsidiary corporation), R. D. Farmer, entered into an oral agreement with C. S. Beekman by which the latter was engaged to sell the company's rock

asphalt on a commission basis, an arrangement which has been continued to the present time. The agreement provided that Beekman was to receive his commissions only when taxpayer received payment for the material sold. Beekman had been acting as sales agent for producers of paving materials and pavements in the State of Oklahoma, and for contractors building state highways, for nearly thirty years. Beekman also represented concerns which sold road machinery and equipment. (R. 13.) He has always worked on a commission basis, never on a salary (R. 47).

During 1937 Beekman sold more than \$170,000 of taxpayer's product to the Oklahoma State Highway Commission. By the end of that year the road-building funds of Oklahoma were exhausted. In January 1938, Beckman was short of funds and asked the taxpayer for an advance on commissions earned but not due. The taxpayer did not have funds with which to pay Beekman, but assigned to his nominee, C. S. Beekman & Company, at face value, certain claims which it had against the State aggregating \$16,893.70. (R. 13.) After the assignment taxpayer paid to Beekman's nominee, C. S. Beekman & Company, \$16,044.05 in checks as commissions on other sales, made in 1938.¹ Thus the total commissions paid

¹ The \$16,893.70 appears to have been paid October 31, 1938 (R. 30).

to and received by Beekman's nominee in 1938 amounted to \$32,937.75. (R. 14, 30.)

In the early part of 1938 Beekman became almost blind and needed assistance in carrying on his sales work. He first called in his brother to assist him. (R. 14, 45-46.) Then (at some date after the Oklahoma State Legislature had adjourned, early in 1938) Beekman formed a partnership under the name of C. S. Beekman & Company. This partnership was composed of C. S. Beekman, H. E. Beekman, Allen G. Nichols, J. C. Nance, James Nance, and Howard Drake. Nichols was a member of and Democratic leader of the Oklahoma Senate, J. C. Nance was a member of the House and leader of the Democratic majority of that body, and Howard Drake was prominent in state politics and had managed the campaign for the election of Governor Marland. (R. 14, 43, 45.)

At the request of C. S. Beekman the checks for the payment of the commissions which were due him under his contract with the taxpayer were made payable to C. S. Beekman & Company or to C. S. Beekman Company. Likewise the three claims of the taxpayer against the State of Oklahoma in the aggregate amount of \$16,893.70 were assigned on January 14, 1938, to "C. S. Beekman Co." Of the amounts received by the partnership one-fourth belonged to Nichols, one-fourth to J. C. Nance and one-fourth to Drake. The split of the

balance is not shown by the record. (R. 14, 28-29, 45, cf. R. 52.)

Taxpayer deducted in its 1938 return, as ordinary and necessary expenses, the commissions paid under its agreement with Beekman in the amount of \$32,937.75. The Commissioner disallowed the deduction, upon the ground that these payments were against public policy. (R. 7-8.) The Board of Tax Appeals found (R. 18-19) that the taxpayer paid Beekman the commissions with the knowledge that at least a part of them would go to persons prominent in politics of the State of Oklahoma, for the exertion of political influence, and held (R. 15, 19) that the commission so paid were not ordinary and necessary expenses paid or incurred in carrying on the taxpayer's trade or business. The Circuit Court of Appeals affirmed (R. 54).

ARGUMENT

1. The Circuit Court of Appeals held (R. 53) that there was substantial evidence to support the finding of the Board (R. 14, 18) that at least a portion of the \$32,937.75 received by the partnership as "commissions" represented payment for the exertion of political influence and that as the taxpayer had not shown what part, if any, represented payment for legitimate services, the entire deduction had been properly disallowed. Cf. *Burnet v. Houston*, 283 U. S. 223, 227-228. We submit that the Circuit Court of Appeals was

correct in holding that the evidence justified the finding of the Board.² The determination of the Board should therefore be conclusive upon appeal. See *Helvering v. Rankin*, 295 U. S. 123, 131; *Helvering v. Kehoe*, 309 U. S. 277, 279; *Wilmington Trust Co. v. Commissioner*, 316 U. S. 164, 168.

2. The decision below accords with *Textile Mills Corp. v. Commissioner*, 314 U. S. 326, where this Court refused to sanction the deduction, as an ordinary and necessary business expense, of lobbying expenditures to procure legislation. The principle implicit in that decision is that since such expenditures are against public policy, they cannot be regarded as "ordinary and necessary," and are therefore not deductible. The payments which the taxpayer made here, for the political influence which Beekman and his associates were able to exert, are subject to like condemnation, not only upon grounds of general public policy but also under the provisions of the Constitution of the State of Oklahoma, Section 23 of which (Appendix, *infra*, pp. 9-11) for-

² See Beekman's testimony that the other partners "went out and worked up the propositions" (R. 46); that contacting the members of the State Highway Commission was "a part of the service which they [Nichols and J. C. Nance] performed" (R. 47); and concerning the daily visits of the other partners to the office of the State Highway Department and the presence of Farmer there on the average of once a week (R. 48).

bids any member of the Legislature during his term of office or within two years thereafter, to be "interested, directly or indirectly, in any contract with the State, or any county or other subdivision thereof, authorized by law passed during the term for which he shall have been elected." See *Baskin v. State ex rel.*, 107 Okla, 272, 274, last paragraph; *Rugel v. Commissioner*, 127 F. 2d 393 (C. C. A. 8th).

Though the decision in the instant case may conflict in principle with *Heininger v. Commissioner*, 133 F. 2d 567 (C. C. A. 7th), certiorari granted, June 14, 1943 (No. 63, this Term), that circumstance does not seem to warrant the granting of certiorari here. The decision of the Seventh Circuit in the *Heininger* case was contrary to many decisions of the circuit courts of appeals and probably conflicted with the decision of this Court in the *Textile Mills* case, *supra*. The decision below in the instant case, on the other hand, follows the current of authority in the lower courts and is consistent with, and probably required by, the decision in the *Textile Mills* case.³ *Alexandria Gravel Co. v. Commissioner*, 95 F. 2d 615 (C. C. A. 5th), which is also relied upon by the taxpayer (Pet. 6), was decided

³ The *Heininger* case is being held for argument in November. If the Court be in doubt as to certiorari in the present case, action upon the petition might be postponed until disposition of the *Heininger* case.

prior to the *Textile Mills* case and in any event is readily distinguishable. The court there assumed (p. 616) "a corrupt expenditure to secure public contracts * * * to be unallowable"; decision went on the ground that there was "no evidence" that the sales agent had agreed "to exert any personal influence to secure contracts," or that he had ever done so. In the present case, moreover, the activities in question were forbidden by Section 23 of the Oklahoma Constitution. In the *Alexandria Gravel* case the court observed (p. 616) that there was no Louisiana law which prohibited "members of its Legislature from dealing with administrative bodies."

CONCLUSION

The petition for a writ of certiorari should be denied.

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NOVEMBER 1943.

